Supreme Court, U.S.
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No. 02-1520

In The Supreme Court of the United States

CHARLES H. BEHLEN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioner,

v.

MERRILL LYNCH & CO., INC., AND PHOENIX INVESTMENT PARTNERS, LTD., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENT PHOENIX INVESTMENT PARTNERS, LTD. IN OPPOSITION

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QUESTIONS PRESENTED

The questions presented in this appeal are: (1) Did the district court have removal jurisdiction over Petitioner's claims; (2) Did the district court properly determine that all of Petitioner's class claims were subject to dismissal under SLUSA; and (3) Did the district court correctly dismiss Petitioner's class claims with prejudice.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Court, Respondent Phoenix Investment Partners, Ltd. states the following: Phoenix Investment Partners, Ltd. is an indirect wholly owned subsidiary of The Phoenix Companies, Inc., a publicly traded company.

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STATEMENT OF THE CASE

A. Course of the Proceedings

On March 15, 2001, Petitioner commenced a civil action in the Circuit Court of Mobile County, Alabama by filing a complaint (the "Original Complaint") on behalf of himself and on behalf of "[a]ll persons or entities who purchased Class B shares from Defendants in the Phoenix-Engemann Aggressive Growth Fund and other affiliated Phoenix funds and who were eligible to purchase Class A shares in the same." Petitioner's Original Complaint asserts various state law claims, including misrepresentation and suppression, and alleges that Respondents Merrill Lynch & Co. Inc. ("Merrill Lynch") and Phoenix Investment Partners, Ltd. ("Phoenix") "negligently, recklessly or intentionally misrepresented the fact that Plaintiff and the class would be sold Class A shares when eligible for the same at reduced sales charges and commissions . . . but . . . sold to them more expensive Class B shares contrary to their representations." The Original Complaint further alleges that Respondents "suppressed the true facts concerning the repeated sale to them of Class B shares in the [Phoenix funds]."

On April 27, 2001, Respondents removed Petitioner's Original Complaint from the Circuit Court of Mobile County to the United States District Court for the Southern District of Alabama pursuant to the terms of the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. §§ 77p, 78bb(f) ("SLUSA").

On April 30, 2001, Respondents filed a Motion to Dismiss Plaintiff's Original Complaint pursuant to SLUSA.

On May 14, 2001, Petitioner filed a First Amended Class Action Complaint (hereinafter "Amended Complaint") with the district court, which purports to remove the claims of misrepresentation and suppression, and which deletes all explicit references to any alleged fraudulent conduct on the part of Respondents.

On June 1, 2001, Respondents filed a Motion to Dismiss Plaintiff's Amended Complaint. On June 1, 2001, Petitioner filed a Motion to Remand.

On August 27, 2001, the district court entered a Memorandum Opinion and Order (the "Order") refusing to remand this case to state court, dismissing the Petitioner's individual claims without prejudice, and dismissing Petitioner's class claims with prejudice. (Pet. App. at A20-A28). Thereafter, Petitioner filed a Motion to Alter or Amend Judgment which was denied by the district court on October 25, 2001.

On November 15, 2001, Petitioner filed an appeal of the dismissal of his claims in the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit Court of Appeals denied Petitioner's appeal in its decision dated November 8, 2002. *Behlen v. Merrill Lynch*, 311 F.3d 1087 (11th Cir. 2002) (Pet. App. at A1-A17). Petitioner then filed a Petition for Rehearing En Banc on November 27, 2002, which was denied on January 13, 2003. (Pet. App. at A18-A19).

Petitioner now seeks review of the decision of the Eleventh Circuit Court of Appeals which affirmed that the present action was removable to the district court and that the district court properly dismissed Petitioner's class claims with prejudice under SLUSA.

B. Statement of Facts

The operative facts, for purposes of these proceedings, are as follows. From November 1999 through March 2000, Petitioner purchased shares in Phoenix mutual funds through his Merrill Lynch broker. In March 2001, Petitioner filed a lawsuit against Respondents in state court, both on an individual basis and on behalf of a class of similarly situated persons. Petitioner alleges that Respondents engaged in wrongful conduct (including misrepresentations, omissions, and deception) in connection with the sale of Class B shares. Petitioner alleges that he and the class were entitled to purchase less expensive shares in the Phoenix funds.

SUMMARY OF ARGUMENT

No conflict exists between the Ninth and Eleventh Circuits concerning the preemptive scope of SLUSA. The Ninth Circuit case cited by Petitioner provides no support for the proposition that a claim framed as a breach of contract cannot be preempted by SLUSA.

No decision of this Court, recent or otherwise, conflicts with the ruling of the Eleventh Circuit in this case. The case cited by Petitioner, *Breuer v. Jim's Concrete of Brevard, Inc.*, No. 02-337, has not yet been decided by this Court, and, moreover, involves the Fair Labor Standards Act and an entirely different procedural issue.

The Eleventh Circuit correctly held that the district court properly exercised removal jurisdiction over the case

and that all of Petitioner's state law claims were preempted by and, thus, subject to dismissal with prejudice under SLUSA.

REASONS FOR DENYING THE WRIT

A. The Eleventh Circuit's Ruling does not conflict with *Falkowski v. Imation Corp.*

Petitioner has attempted to "red flag" this case by asserting that a conflict exists between the Eleventh Circuit's decision in this case and the Ninth Circuit's decision in *Falkowski v. Imation Corp.*, 309 F.3d 1123 (9th Cir. 2002). There is no conflict.

In *Falkowski*, the plaintiffs filed a class action lawsuit in state court asserting state law fraud claims relating to the exercising of stock options and breach of contract claims relating to the acceleration/termination of multiple stock option agreements. *Id.* at 1126-27. The district court held that the plaintiffs' fraud claims were preempted by SLUSA and dismissed the breach of contract claims because "the contracts on their face foreclosed the breach of contract claims. . . . " *Id.* at 1127. The district court apparently did not hold that plaintiffs' breach of contract claims were preempted by SLUSA. The breach of contract claims were dismissed without leave to amend because the district court determined that they were barred by the terms of the contracts themselves. *Id.* The Ninth Circuit held that the case was properly removed and that the district court correctly dismissed the plaintiffs' state law fraud claims because they were preempted by SLUSA. *Id.* at 1131. While the Ninth Circuit did reverse the dismissal

of the breach of contract claims, the reversal had absolutely nothing to do with the scope of preemption under SLUSA. The Ninth Circuit simply held that the district court had overstepped its bounds in ruling on a motion to dismiss by holding that the contracts, by their unambiguous terms, barred the claims. *Id.* at 1131-32. *Falkowski* does not address how or whether the state law breach of contract claims were related to the fraud claims and nowhere indicates that state law breach of contract claims can never be subject to preemption under SLUSA. Indeed, *Falkowski* gives no indication that the harm allegedly suffered by the plaintiffs from the breach of contract and fraud claims was the same. On the contrary, in *Falkowski*, the breach of contract claims concerned the acceleration and termination of the options while the fraud claims stemmed from options-related misrepresentations which occurred at an earlier date in connection with the plaintiffs' decision to accept employment. *Falkowski*, therefore, is clearly distinguishable from the case below. As both the district court and the Eleventh Circuit have clearly stated, Petitioner's claims all arise from the same alleged transaction in which he claims he was "wrongfully induced" to purchase securities.

B. The Eleventh Circuit's Ruling does not conflict with any recent decision of this Court

Although Petitioner asserts that the Eleventh Circuit's ruling in this case is in conflict with a "recent" decision of this Court (*see* Pet. at 10-14), Respondent cannot identify the allegedly conflicting case. Petitioner references only two recent decisions of this Court – *Syngenta Crop Protection, Inc. v. Henson*, 123 S. Ct. 366,

370-71 (2002) and *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826 (2002). *Syngenta Crop Protection* concerns removal under the All Writs Act, is not a securities case, and contains no reference to SLUSA. In *Holmes Group*, the Court addressed the correct venue for the appeal of patent-related cases and held that federal appellate jurisdiction could not be based upon a patent-related counterclaim. *Holmes* is not a SLUSA case and does not involve a statute, like SLUSA, which expressly provides for removal of a particular class of claims.

Petitioner does discuss a Fair Labor Standards Act ("FLSA") case from the Eleventh Circuit, *Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F.3d 1308 (11th Cir. 2002), in which this Court has granted a petition for writ of certiorari. However, the Court has rendered no decision in *Breuer*. Therefore, the Eleventh Circuit ruling in this case cannot currently be in "conflict" with this Court's decision in *Breuer*. *Breuer* is inapposite in any event.

Breuer is an FLSA case, not a SLUSA case. In *Breuer*, the plaintiff argued that the FLSA provision which states that an action under the statute "may be maintained" in any state or federal court of competent jurisdiction expressly prohibits removal to federal court because the word "maintain" in that context should properly be construed as meaning "prosecute . . . to final judgment in the chosen forum." *Id.* at 1308-09. 28 U.S.C. § 1441(a) permits removal of any case from state court which arises under a federal statute, "except as otherwise expressly provided by Act of Congress." The Eleventh Circuit affirmed the district court's denial of the plaintiff's motion to remand and held that the FLSA did not contain language expressly prohibiting removal under 28 U.S.C. § 1441. *Id.* at 1310. In the instant case, the subject statute actually authorizes

removal: "**Removal of covered class actions** – Any covered class action brought in any State court involving a covered security . . . shall be removable to the Federal district court for the district in which the action is pending." 15 U.S.C. § 77p(c); *see also* 15 U.S.C. § 78bb(f)(2). Even if this Court does reverse *Breuer*, the decision would have no impact upon the continuing validity of the Eleventh Circuit's holding in this case. The relevant statutory language in SLUSA is prohibitory: "*No* covered class action . . . may be maintained in any State or Federal Court. . . . " 15 U.S.C. § 77p(c) (emphasis added); *see also* 15 U.S.C. § 78bb(f)(2). The language from the FLSA is permissive: "may be maintained." 29 U.S.C. § 216(b). Further, the FLSA, unlike SLUSA which expressly authorizes removal, is silent with respect to removal.

C. The Eleventh Circuit correctly held that removal jurisdiction was properly exercised by the district court

The Eleventh Circuit correctly held that "prospective class actions" are "covered class actions" under SLUSA and, thus, "are removable to federal court even if the state court has not determined whether the action should go forward as a class action." *Behlen*, 311 F.3d at 1092-93 (Pet. App. at A10) (construing 15 U.S.C. §§ 77p(f)(2)(A)(i)(I) and, 78bb(f)(5)(B)(i)(I)). Nothing in the language of SLUSA suggests that class certification prior to removal is required. *Id.* (Pet. App. at A11). Further, Petitioner's argument that a case must be "certified as a class action" prior to removal is, as stated by the Eleventh Circuit, "contrary to the stated objective of SLUSA" – that is, "[t]o enable securities defendants to obtain early dismissal of frivolous

class actions, and thereby avoid the high expense of discovery." *Id.* at 1093.

D. The Eleventh Circuit correctly held that Petitioner's state law class claims were preempted by SLUSA and, therefore, were properly dismissed with prejudice

The Eleventh Circuit correctly held that, once a case is determined to have been properly removed (*i.e.*, the state law claims have been determined to be preempted by SLUSA), SLUSA requires that the case be dismissed. *Behlen*, 311 F.3d at 1095 (Pet. App. at A15). Petitioner claims that the Eleventh Circuit erred in affirming the dismissal with prejudice of what he claims are non-fraud related state law class claims. (Pet. at 7-10). Petitioner has missed, misunderstood, or ignored a critical holding made by both the district court and the Eleventh Circuit: there simply are no state law class claims in this case which do not arise from the underlying claim that he was wrongfully induced to purchase securities. Both the district court and the Eleventh Circuit held that Plaintiff's entire case (regardless of the particular cause of action asserted) hinged upon an alleged untrue statement or omission of fact. *See Behlen*, 311 F.3d at 1095 n. 6 (Pet. App. at A15); (Pet. App. at A24-26). Consequently, the district court properly dismissed all of the class claims with prejudice because Petitioner could not recover on any state law claim alleging that he was "wrongfully induced" to purchase Class B shares. *Id.*

CONCLUSION

For all of the foregoing reasons,[1] Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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[1] Respondent Phoenix also adopts as its own and incorporates by reference, as though fully set forth herein, the Reasons for Denying the Petition in the Brief for Respondent Merrill Lynch & Co., Inc. in Opposition.